

SPECIAL IMMIGRATION APPEALS COMMISSION

Field House,  
Breems Buildings  
London  
EC4A 1WR

Wednesday, 16<sup>th</sup> January 2013

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN  
UPPER TRIBUNAL JUDGE GLEESON  
SIR BRIAN DONNELLY

BETWEEN:

H2

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR F SAIFEE (instructed by HMA Solicitors) appeared on behalf of the Appellant.

MS K GRANGE (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State.

MS M PLIMMER (instructed by the Special Advocates Support Office) appeared as Special Advocate.

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PRELIMINARY ISSUE  
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1 MR JUSTICE IRWIN: Yes, Mr Saiffee.

2 MR SAIFEE: Sir, I appear on behalf of the appellant and I would like to renew my  
3 application for an adjournment of the hearing today. I rely on the two witness  
4 statements of my instructing solicitor, Saghir Hussain; to the extent that the second  
5 witness statement dated yesterday is served out of time, I seek permission to adduce it  
6 and rely on it.

7 MR JUSTICE IRWIN: You can certainly adduce it and rely on it.

8 MR SAIFEE: I am grateful. Sir, essentially, there are three reasons for seeking this  
9 adjournment. Firstly, H2's whereabouts in a New York prison were first revealed about  
10 three and a half weeks ago. Despite my instructing solicitors' best efforts, as carefully  
11 documented in the witness statements, they have been unable to take detailed  
12 instructions or any evidence whatsoever from H2 himself on either of the two  
13 preliminary issues. The telephone call facilitated last night by the US prosecutor was  
14 helpful, but, I say, was subject to serious limitations, including the time limit on the  
15 telephone call and issues about the privacy of the call, which, perhaps, unsurprisingly,  
16 resulted in my client being unable to give detailed instructions to us. It certainly was  
17 no cure for his inability to provide any evidence in the form of a witness statement in  
18 relation to either of the issues. Nonetheless, it is now understood from the brief  
19 instructions that we took last night that it is his contention that the first appeal notice  
20 from 5<sup>th</sup> October 2010 was valid, given that he had authorised his mother at some time  
21 prior to to sign it, and also he has confirmed expressly to us that he wants to appeal and,  
22 if that requires an extension of time that he needs to apply for it.

23 The second reason is that, although H2 may have authorised his mother to bring  
24 this appeal in the first place, it does not follow, I say, that this is in some way her  
25 appeal. This Commission does not need H2's instructions or his evidence. I say that  
26 both of those elements are crucial to a fair determination of the matters today.

27 Thirdly, sir, I say that British citizenship would make a significant difference to  
28 this young man facing very serious criminal charges in New York. There is a danger  
29 that proceeding today important detail might be lost, if his evidence and instructions are  
30 presented to the Commission, second or third hand, through ourselves or the US  
31 Attorney, respectively.

32 MR JUSTICE IRWIN: Yes.

33 MR SAIFEE: Sir, that, in essence, is my application.

34 MR JUSTICE IRWIN: Attached to the second witness statement of your instructing solicitor  
35 is a further notice of appeal or is that merely a further copy of the original?

1 MR SAIFEE: No. Sir, there was some reference to it in the first witness statement, there was  
2 an attempt to get a signed notice of appeal, it was not understood at that stage when it  
3 was sent to him what his instructions were about authorisation in relation to the first  
4 appeal. The second notice of appeal was received yesterday morning. Yesterday  
5 evening, once we had spoken to him, he said to us that he thought that he had  
6 authorised his mother to bring the first appeal. Therefore, it is my position in relation  
7 to the first preliminary issue that that appeal notice is valid through him having  
8 authorised his mother.

9 MR JUSTICE IRWIN: You stand or fall on the October appeal?

10 MR SAIFEE: Yes. I understand that that is disputed. The Treasury solicitors say that, well, it  
11 is not a valid notice of appeal, his mother was involved in it, he was not. But the issue  
12 of fact there, I say, is whether or not he had authorised his mother to authorise my  
13 instructing solicitors, it is plain from the SIAC procedural rules that an appellant does  
14 not need to personally sign an appeal notice, it can be signed by a representative.

15 MR JUSTICE IRWIN: I do not need you, Mr Saiffee, to make the argument now. What I  
16 think we do need to know is whether you are, once and for all, standing over that notice  
17 of appeal, because the very worst outcome would be that you test that and then you say  
18 later, "Oh well, he is going to appeal, anyway, and ask for time to be extended". Do  
19 you follow me?

20 MR SAIFEE: Yes.

21 MR JUSTICE IRWIN: We have to know where we are now.

22 MR SAIFEE: Sir, I can only put it in the way that these instructions have reached us, in the  
23 slightly unsatisfactory way in which they have reached us, which is that he said that he  
24 authorised his mother to do that. We have not had the chance within that half an hour  
25 telephone call to explain the associated issues in relation to that. An attempt was,  
26 obviously, made earlier on in January to obtain a signed appeal notice himself. You  
27 will have seen my skeleton argument which indicates that that would have made one of  
28 the issues academic, but, sir, I can just convey his instructions on that. I understood it  
29 that he was standing by 5<sup>th</sup> October.

30 MR JUSTICE IRWIN: Your application is for an adjournment, but I should make it clear that  
31 we have, obviously, discussed this between ourselves. The Commission needs to know  
32 - and, essentially, it is a legal point - whether you stand over the mother's signed form  
33 or whether you seek to introduce a further form; we need to know that for sure within a  
34 short time, so we can consider that in a moment. There is nothing else that you want to  
35 add on the principal application.

36 MR SAIFEE: Sir, no.



1 MR JUSTICE IRWIN: Shall we ask the special advocate if there is anything to be said?

2 MS PLIMMER: No, thank you.

3 MR JUSTICE IRWIN: Ms Grange.

4 MS GRANGE: Sir, I should make clear that we received a copy of this witness statement  
5 about 15 minutes ago. We were just handed it. We have not had much time to consider  
6 the latest evidence, although it does trouble us, in terms of the contents of it, because, if  
7 one looks at paragraph 6 of the latest statement, based on the 35-minute conversation  
8 that was had, it is made clear in the fifth line that he said that he had authorised his  
9 mother to sign the appeal notice dated October 2012. If one looks at the mother's  
10 evidence that has been served in this appeal, it appears at page 25 of the open bundle  
11 behind tab 6 ... We should pick it up at page 24, behind tab 6.

12 MR JUSTICE IRWIN: Yes.

13 MS GRANGE: This is the mother's evidence about the contact that they had with him after  
14 the deprivation notice was served. It states at paragraph 30 at the bottom of that page,  
15 "By the time we were able to get in touch with him the 28-day period referred to by Mr  
16 Larkin on the phone was over. It was past July 15<sup>th</sup> when we spoke to him and it was,  
17 possibly, on 20<sup>th</sup> July that we spoke to him. I spoke with him on the phone. I asked  
18 him why he had not been in contact", etc. Then at the end of that paragraph, it says,  
19 "He said he wanted to take action and appeal. We planned to speak again to finalise the  
20 documents for the appeal. However, that was the last conversation that we had".

21 MR JUSTICE IRWIN: Yes.

22 MS GRANGE: Sir, in our submission, those two statements are inconsistent, that he has  
23 authorised her to sign the appeal notice dated October 2012 and that the mother has  
24 stated that they were planning to speak again, but that was the last conversation that  
25 they had. This highlights the concerns that we have raised in the skeleton argument  
26 about issue number one. We do not accept that you should adjourn issue one. We  
27 think that issue one should be determined today, in that you have ample evidence to  
28 conclude whether or not the SIAC rule, which is very specific as to what it requires,  
29 was or was not complied with. That is an important preliminary issue to determine.  
30 That would then set the tone for the rest of this appeal and it would appear to be my  
31 learned friend's position that they are not abandoning that first appeal, they want to  
32 press ahead. If that is right, and I would like to address you in closed on this issue as  
33 well, we would say that SIAC should consider whether, in fact, it goes on to determine  
34 preliminary issues one and two today. We would oppose an adjournment.

35 MR JUSTICE IRWIN: You want to address us in closed before the adjournment decision is  
36 taken?

1 MS GRANGE: Yes.

2 MR JUSTICE IRWIN: Is there anything else that you want to say in open?

3 MS GRANGE: No.

4 MR JUSTICE IRWIN: Just give us a moment. (Conferred) We will go into closed session  
5 so we can listen to your representations.

6 (Hearing resumed in closed session  
7 and then returned into open session)

8 Mr JUSTICE IRWIN: We first want to check, Mr Saiffee, whether there is anything that you  
9 want to add.

10 MR SAIFEE: Yes, sir, if I may, very briefly. Can I say that there are five points that I would  
11 like to make? The first is in relation to what my learned friend said in open just before  
12 we rose. Really, that is exactly the point that I am talking about. The discrepancy that  
13 my learned friend sought to indicate between the instructions my solicitor had taken  
14 last night and the witness statement of the mother, that is exactly the kind of confusion  
15 that results from us not being able to take direct instructions and evidence from our  
16 client in New York. The second point is that, following the conversation we had last  
17 night with H2, we have serious concerns about what records the Djiboutians may have  
18 taken; thirdly, we have very serious concerns about how any interrogations took place  
19 and whether there was a threat of torture preceding any of those.

20 MR JUSTICE IRWIN: I do not follow that point.

21 MR SAIFEE: Sir, my instructing solicitor and I have not seen any of the closed material in  
22 this and we are left to guess what may be there and what may be said. These are some  
23 of the issues arising from our client's perspective.

24 MR JUSTICE IRWIN: What has that to do with the two first preliminary issues? How could  
25 that affect the two first issues?

26 MR SAIFEE: Well, in relation to whatever may have been said ... Well, I will move on.  
27 Time appears to be an important point here and I say that, even in the open evidence,  
28 the application in the US to unseal the indictment, even that itself is unclear about the  
29 specific dates. It refers to early August.

30 MR JUSTICE IRWIN: As to when ...

31 MR SAIFEE: As to when H2 may have first been arrested.. These are important issues. I say  
32 that even the application to unseal there is not clear and H2 should at least have the  
33 opportunity of putting forward a case on it. I say that in relation to this application for  
34 an adjournment, H2 is not simply being asked to aim at a hidden target, he is not being  
35 even given the opportunity if an adjournment would be refused to even advance his  
36 instructions and evidence against it.



1 MR JUSTICE IRWIN: Yes. Any more?

2 MR SAIFEE: Sir, no. I am very grateful. Thank you.

3 MR JUSTICE IRWIN: (Conferred) The application to adjourn succeeds. It is necessary to  
4 be clear about what time is needed on the adjourned hearing and about when it should  
5 be listed. In due course I will give detailed directions, but we need the framework to be  
6 based on a clear understanding of time estimate and date. It will be our desire to list  
7 this before the end of July, at the very latest. It is in no one's interests for this to go off  
8 beyond that. Recognising the practicalities for the appellant's lawyers in taking  
9 instructions, nevertheless, there has to be a clear end point when this matter is resolved.  
10 It is only two preliminary issues. We have to allow for the possibility that a further  
11 hearing will be needed after that.

12 What I will direct is this. There will be an adjournment. Within seven days I  
13 would ask for the parties to submit jointly, if at all possible, agreed proposed detailed  
14 directions. That should include a directions hearing at some stage before Easter. I can  
15 deal with that on my own. It will not require my colleagues to be present, but I can  
16 anticipate that there are matters here which, both in open and, possibly, in closed, will  
17 need discussion in detail. The timetable should include a directions hearing. Our own  
18 view was that a day should see this case through when it comes to the two preliminary  
19 issues outstanding, but, if anyone differs from that, I would like to hear that today.

20 MR SAIFEE: No.

21 MR JUSTICE IRWIN: Good. We will aim for a day's hearing. Dates of availability of  
22 counsel I will certainly look at but no guarantees. I think that that is all we need to say,  
23 save for this. We are going to need to reassemble in closed to raise another point  
24 before the parties disperse.

25 MR SAIFEE: Before you rise, could I also make an application on behalf of H2 and that is to  
26 lift the anonymity order? As I understand it, the anonymity order is made in order to  
27 protect a potential appellant. In the US, currently, the indictment has been unsealed.  
28 The proceedings against him in the US, at least, are entirely public and it is his express  
29 instructions to us yesterday on the telephone that he wants to lift the order.

30 MR JUSTICE IRWIN: You can make that application at the directions hearing, because I  
31 think that that is something that all parties might want to think about and it is something  
32 that I saw only arose very recently in what you had to say. I am not going to deal with  
33 that today, Mr Saiffee, but you can deal with it in due course.

34 MS GRANGE: I am happy to indicate now we are very happy for it to be lifted.

35 MR JUSTICE IRWIN: You are?

36 MS GRANGE: We are.

1 Mr JUSTICE IRWIN: Do you want to say anything?

2 MS PLIMMER: No objection, if that is what the appellant wants.

3 MR JUSTICE IRWIN: (Conferred) I would rather thought there might be more to it than that.

4 If you are content, then we will lift the anonymity today. We need to go into closed. It

5 will not take long.

6 MS GRANGE: Sir, just before we rise, sir, I would urge the Commission to request that the

7 open team make their position clear as to which appeal it is that they are proceeding

8 with and make that position clear either later today or within the next day or so.

9 MR JUSTICE IRWIN: I think that I have already said within seven days we need to know

10 whether - you need to make your election, are you proceeding on the original notice,

11 are you proceeding on the second or are you going in the alternative.

12 MR SAIFEE: Sir, can I just say in respect of that point, that does require us to advise our

13 client in relation to the two possible outcomes. We were told expressly by the US

14 prosecutor yesterday, when we first picked up the phone, that the telephone

15 conversation we had had was entirely exceptional and after that phone call we would

16 not have access to H2 in that way again and we would have to go through normal

17 channels, which we understood to mean further delay in the sense of going through the

18 US Defence Attorney, possibly, even having to go to the United States actually to speak

19 to him. Given that this is a central issue that could determine the fate of the whole

20 appeal, sir, I would say that it would be fair for us to first at least be able to advise our

21 client on that point before we make an election.

22 MR JUSTICE IRWIN: Well, what we cannot have and what I will not permit is exhausting

23 the first notice of appeal and then starting again with the second. If you are proposing

24 to stand over both notices of appeal in the alternative, then you must say that that is

25 what you intend to do within seven days. You can withdraw from that position

26 subsequently very easily. What we cannot have is doubt on the point so that everyone

27 cannot address it. You will have to make your minds up and what your advice is going

28 to be and let us know within seven days whether you intend to stand over both notices

29 of appeal. It is a legal point. You can take instructions on it and withdraw from one or

30 both subsequently, what you cannot do is seek to maintain both subsequently.

31 MR SAIFEE: Sir, the likely outcome is exactly as the Commission has outlined, that is likely

32 to be our position within seven days, unless, of course, we are able to take instructions

33 before then.

34 MR JUSTICE IRWIN: I think that it is much better that you indicate that you are intending to

35 stand over both until such time as you indicate that you withdraw from one or the other

36 MR SAIFEE: Yes.

1 MR JUSTICE IRWIN: There may come a time when I will direct you to make your election,  
2 but for the moment I think the working assumption will be that you will seek to run  
3 both in parallel and, if one fails, the other will be sought to be maintained.

4 MR SAIFEE: Yes, exactly right. That is our point.

5 MR JUSTICE IRWIN: Confirm that, please, in writing within seven days. There is nothing  
6 lost by that, because I cannot think of any evidence or preparation that will be added to  
7 by taking that approach and it means that we have got certainty.

8 MR SAIFEE: Yes, quite right.

9 MR JUSTICE IRWIN: Let's go into closed, please.

10 (Hearing resumed in open hearing  
11 and then concluded)  
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